directors can be personally liable for the default of the company. I do not refer to the multiplicity of authorities which demonstrates that the officers of the company are responsible for the conduct of the company. If therefore an order under rule 30(4) is disobeyed, the directors can be summoned to show cause why they should not be committed to prison for contempt of court.

The matter before me, however, is simply an application for leave under Order 40 rule 28 I cannot find any judgment or order made against the defendant company which has been wilfully disobeyed. In those circumstances, I dismiss this appeal.

Mrs. Appaduray also asked for leave to appeal. I refuse her leave.

Appeal dismissed.

Solicitors: *Shelley Yap & Irene Appaduray.*

A MALAYSIAN REPORTS

HAJI LAUGAN TARKI BIN MOHD. NOOR v. MAHKAMAH ANAK NEGERI PENAMPANG

[S.C. (Salleh Abas L.P., Seah & Hashim Yeop A. Sani S.C.JJ.) 11 February & 14 March 1988]

B [Kuching – Supreme Court Civil Appeal No. 27 of 1988]

Native Law and Custom – Offence of slander or making false and defamatory allegations – Whether triable in Native Court – Breach of native law or custom – Native Court has no jurisdiction over act which constitutes an offence under the Penal Code – Power to impose prison sentence must be authorized by federal legislation – Whether certiorari lies against decision of Native Court – Provision for appeals not a bar – Native Courts Ordinance, ss. 5, 7 & 10(a) – Penal Code, s. 2 – Federal Constitution, Ninth Schedule, List IIA.

Administrative Law – Application for leave to issue certiorari to quash decision of Native Court – Provision for appeals – Whether a bar – Native Courts Ordinance, ss. 5, 7 & 10(a) – R.H.C. 1980, O. 53.

In this case, the appellant had been convicted and sentenced by the Penampang Native Court to one month's imprisonment for the offence of slander or making false and defamatory allegations against one James Ligunjang. He applied for leave for an order of certiorari to quash the decision. The learned judge of the High Court refused leave under Order 53 of the Rules of the High Court 1980 and in his grounds of decision stressed the elaborate appeal provisions contained in the Native Courts Ordinance. The appellant appealed.

Held, allowing the appeal: (1) the existence of an elaborate appeal provision in the law concerned is not a conclusive ground to refuse leave for an order of certiorari. The court has a discretion to issue an order of certiorari if it can be shown that there is lack of jurisdiction or there is a blatant failure to perform some statutory duty or there is a breach of natural justice;

(2) the underlying principle is that the jurisdiction of the High Court to grant an order of certiorari is supervisory in character and is exercisable over all inferior tribunals. The Native Courts are creatures of statute and the High Court can exercise control over Native Courts through the prerogative writs;

(3) it cannot be the intention of the Native Courts Ordinance to allow the Native Court to assert jurisdiction over an act which constitutes an offence under the Penal Code as the Ordinance gives no definition or guidance as to the meaning of "breach of native law or custom";

(4) the power to impose a prison sentence under section 7 of the Native Courts Ordinance as opposed to the power to award compensation can only be authorized by federal legislation to be passed in accordance with Item 13 of List IIA of the State List in the Federal Constitution;

(5) the Penampang Native Court in this case therefore acted without or in excess of jurisdiction when it imposed the sentence of imprisonment on the appellant. The appeal must therefore be allowed and the decision of the Native Court quashed and the conviction and sentence set aside.

Cases referred to:

(1) *Government of Malaysia* v. *Jagdish Singh* [1987] 2 M.L.J. 185 (apprvd.)
(2) *Commissioner of Religious Affairs* v. *Tengku Mariam* [1970] 1 M.L.J. 222 (refd).
(3) *Re James Lee Kui Wah*, (1962), Lee Hun Hoe's Cases on Native Customary Laws in Sabah 37 (apprvd).
(4) *Re Datuk James Wong Kim Min* [1976] 2 M.L.J. 245 (refd).

SUPREME COURT.

Sugumar Balakrishnan for the appellant.

Stephen Foo Kiah Shin (State Attorney-General, Sabah) (*A. Juprin* with him) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J.: (delivering the grounds of decision of the court): This was an appeal against the refusal by the learned judge of the High Court, Kota Kinabalu for leave under Order 53 rule 1 of the Rules of the High Court 1980 for an order of certiorari to quash the decision of the Penampang Native Court made on 22 January 1988. The appellant was convicted and sentenced by the Penampang Native Court to one month's imprisonment for the offence of "slander" or making false and defamatory allegations against the complainant, one James Ligunjang. We allowed the appeal, granted leave and considered the merits and at the conclusion of the hearing of the appeal we quashed the said decision of the Penampang Native Court and set aside the conviction and sentence. We now give our reasons.

First, the background facts. On 3 December 1987, the appellant who was a former district chief of Tuaran (and during his tenure as district chief also presided over the Tuaran Native Court) lodged a police report for alleged abuse of public office and funds by the said James Ligunjang during the latter's tenure as chairman and, later, general manager of the Sabah Tourism Promotion Corporation. The details of this report somehow found its way into the *Sabah Times* dated 4 December 1987 where it was alleged that the said James Ligunjang had illicit sexual relationships with two models in London and Sydney. There is no evidence, however, that the appellant was responsible for the publication of the said materials in the *Sabah Times*.

On 31 December 1987, the said Mr. James Ligunjang lodged a complaint with the Penampang Native Court that the appellant had made a false report against him in the local newspaper on 4 December 1987. This is in reference to the same report referred to earlier. The Penampang Native Court took cognizance of the offence of "slander" and issued a summons against the appellant. A copy of the summons appeared as "A"42 in the appeal record and the charge in the summons is referred to as "Tuduhan palsu (Fitnah)". The summons was dated 31 December 1987. On the first date of hearing (7 January 1988), the appellant did not turn up because of illness but appeared subsequently before the Native Court on 22 January 1988.

In the meantime, it would appear that other developments were also taking place as a result of the police report lodged by the appellant referred to earlier. The police carried out investigations and on 15 January 1988 arrested the appellant. The appellant was released on police bail on the following day and was, according to him, waiting to be formally charged under section 182 of the Penal Code.

According to the record of the proceeding before the Penampang Native Court ("DJM-4") the court was presided by one Datuk O.K.K. Jintol Mogunting with two other members. The proceeding commenced with the statement by the complainant, James Ligunjang, who referred to the allegation made in the said newspaper report published on 4 December 1987. He said that his name had been adversely affected in Sabah, Malaysia and throughout the world and asked the Native Court for relief.

From the record of the proceeding, it would appear that right from the commencement of proceeding the appellant disputed the jurisdiction of the Native Court in respect of the alleged offence. In fact, he reiterated throughout the proceeding that he was not submitting to jurisdiction but merely appeared as a sign of respect to the Native Court. He admitted lodging the police report but denied publishing the materials in the newspaper. He also stated that the Anti-Corruption Agency was still investigating on his report on the alleged misuse of public funds.

At the conclusion of the hearing before the Native Court, it was recorded in the notes of the proceeding that the Native Court then examined the international passport of the complainant and was satisfied that the complainant did not visit either of the countries referred to in the newspaper report at the material time. Accordingly, the Native Court found the appellant guilty of the

offence of "slander" and purporting to invoke section 7 of the Native Courts Ordinance of Sabah (Cap. 86) (hereinafter referred to as "the Ordinance") sentenced the appellant to one month's imprisonment.

The appellant appealed to the district officer. He also applied for stay of execution which, however, was refused. Then the appellant applied for leave for an order of certiorari in the High Court in Kota Kinabalu. During the hearing of the application for leave, the learned judge was informed that the District Officer had by then dismissed the appeal of the appellant.

So much for the background facts.

Now, it is clear that from the very commencement of proceeding before the Native Court the appellant had challenged the jurisdiction of the Native Court.

The grievances of the appellant are set out in detail in his affidavit dated 23 January 1988 filed in the High Court. For convenience, the relevant parts are reproduced below:

"11. I am advised and verily believe that the respondent is not competent to take cognizance of the subject matter of the complaint since it does not involve a breach of native law or custom.

13. The respondent, however, overruled my objection and held that it had jurisdiction to try me for the offence of making false and defamatory allegations as it constituted a breach of native custom or law.

21. The offences for which I was convicted and sentenced by the respondent are offences under section 182, namely, giving false information with intent to cause a public servant to use his lawful power to the injury of another person, and section 499, namely, criminal defamation.

22. On 15 January 1988, I was arrested by the police for an alleged offence under section 182 of the Penal Code in respect of my police report against Encik Ligunjang. I was released on police bail the following day. I have yet to be formally charged in the magistrates' court.

23. If I were to be charged in the magistrates' court for an alleged offence under section 182 of the Penal Code, I would be subject to double jeopardy since I am already serving a sentence for the same offence. I fear I may not be able to plead Article 7(1) of the Federal Constitution since that plea applies only where I have been tried by a court of competent jurisdiction, which the respondent is not.

24. I am advised that the Criminal Procedure Code confers no jurisdiction on the respondent and there is no ordinance which confers jurisdiction upon the respondent to administer justice under the Penal Code.

26. I am also advised that where an act is at once an offence under the Penal Code and a breach of native law or custom, it is the law that a person who commits an act contrary to the provisions of the Penal Code shall be punished under the Penal Code and not otherwise."

In his grounds of decision, the learned judge in refusing leave under Order 53 of the Rules of the High Court stressed on the elaborate appeal provisions contained in the Ordinance.

It would seem beyond question that it is now settled law that it is not an inflexible rule that where there is an appeal provision however elaborate in the relevant statute (which an aggrieved person can take advantage of), leave for an order of certiorari should automatically be refused. It was held in *Government of Malaysia* v. *Jagdish Singh*[1] that the court has a discretion to issue an order of certiorari if it can be shown that there is a lack of jurisdiction or there is a blatant failure to perform some statutory duty or there is a breach of natural justice. Therefore, the existence of an elaborate appeal provision in the law concerned is not a conclusive ground to refuse leave.

The underlying principle should always be remembered that the jurisdiction of the High Court to grant an order of certiorari is supervisory in character and is exercisable over all inferior tribunals. The Native Courts are creatures of statute and the High Court can exercise control over the Native Courts through the prerogative orders. Also as Hickling said in his book *Malaysian Law* at p. 70:

"Such a control is important, since it is essential to have one supreme authority in any field of human activity. As English history illustrates, two systems of courts with parallel authority cannot exist together in harmony."

The civil court asserted its authority in *Commissioner for Religious Affairs* v. *Tengku Mariam.*[2] That was an appeal before the Federal Court from the judgment of the High Court which declared a wakaf to be invalid. It appeared that the parties had agreed to refer the document of wakaf to the mufti and abide by the decision of the mufti. That was done and the mufti gave a fatwa that the wakaf was valid. In the leading judgment, Suffian F.J. referred to the Federation of Malaya Agreement 1948 which was the Constitution at the relevant time and concluded that the scheme of the Agreement was clearly to divide courts into two distinct categories, civil and religious, and that only the federal legislature had power to legislate regarding civil courts, leaving Muslim religious

courts to the legislature of the state. The ruling of the mufti was published by notification in the Gazette. The question raised before the Federal Court was whether the notification was binding on the High Court. Both the High Court (Wan Suleiman J.) and the Federal Court ruled that the High Court was not precluded from determining the validity of the wakaf despite the notification.

The Merdeka Constitution of 1957 replaced the Federation of Malaya Agreement 1948 but it has in no way altered the position.

One of the basic complaints of the appellant in the instant case may be summarized into the following question, *i.e.* can the High Court question the power of the Native Court in taking cognizance of an offence under section 5 of the Ordinance?

According to the affidavit of Datuk O.K.K. Jintol Mogunting who presided over the Penampang Native Court in this case, the complaint against the appellant:

"raised the issue pertaining to false accusation of sexual relationships which the complainant stated had tarnished his reputation, status and name."

He also affirmed that the allegation referred to is:

"in breach of native laws and customs of the Kadazan in Sabah and falls within the jurisdiction of the Native Court."

The complainant is a Kadazan who comes from and resides in the district of Penampang.

As stated by the learned judge, the Native Court by virtue of section 5 of the Ordinance can exercise jurisdiction to the extent set forth in that section subject to the provision of the Ordinance. Section 5 of the Ordinance sets forth the jurisdiction as follows:

(a) in cases arising from the breach of native law or custom in which all parties are natives;

(b) in cases arising from the breach of native law or custom, religious, matrimonial or sexual, if the sanction of the district officer or Native Court officer has been obtained to the institution of proceedings where one party is a native; and

(c) Muslim cases (now deleted);

(d) in other cases if jurisdiction is conferred on it by this or other Ordinance.

It is unfortunate that what are breaches or offences against native law or custom are not set out clearly in the Ordinance to avoid unnecessary argument on the jurisdiction of the Native Court. The very first question for the Native Court to consider is whether a particular act or conduct amounts to a breach of native law or custom. There is no guide on the exercise of this jurisdiction except for materials like *Woodley's Codes* and other materials. If, however, the Native Court decides that an act amounts to a breach of native law or custom, we do not think the civil court should interfere for it will be within the jurisdiction of the Native Court of Appeal under section 10A of the Ordinance to determine such a question since under subsection (2) thereof an appeal shall lie as of right on any ground of appeal which involves the question of native law or custom alone.

The question which is, however, more serious is what the learned judge referred to in his grounds of decision as the "very flexible thin line" in the Native Court which separates its civil jurisdiction and its criminal jurisdiction. The learned judge said that he was not impressed by the argument that if the offence is triable under the Penal Code the offence cannot be taken cognizance of by any other court than the one administering the Criminal Procedure Code.

There are two crucial issues arising from this question. The first issue arises from the vague and wide nature of section 5 of the Ordinance referred to earlier. The apparently wide jurisdiction conferred on the Native Courts by section 5 coupled with the almost unlimited power of punishment conferred by section 7 of the Ordinance will certainly lead to serious repercussions. The question which comes to mind immediately is whether the jurisdiction of the Native Court is really without limit.

In our view, because of the fact that the Native Courts coexist within a constitutionally established judicial system in this country, the scope and ambit of section 5 of the Ordinance must necessarily be limited by that system.

In order to demarcate the limit, we would respectfully adopt the opinion of Ainley C.J. in *Re James Lee Kui Wah,*[3] a case decided in 1962 which appeared in Tan Sri Lee Hun Hoe's compilation "Cases on Native Customary Laws in Sabah (1953-1972)" at pp. 37–42. James Lee Kui Wah was a Chinese against whom complaints were

made by a number of Indonesian women who were immigrants. The Native Court sitting at Tawau convicted the said James Lee Kui Wah of attempt to rape several immigrant Indonesian women contrary to section 5 of the Native Courts Ordinance. The Native Court sentenced him to three months' imprisonment and a fine of $100. He then applied to the High Court for an order of certiorari to quash the conviction for want of jurisdiction. Held:

"(1) Although the High Court cannot assume appellate power over Native Courts and even attempt to correct error of customary law by means of certiorari it nevertheless may issue an order of certiorari by virtue of the Application of Laws Ordinance to the Native Courts which are created by statute and not by custom since certiorari is the most appropriate remedy where question of jurisdiction arises involving the construction of ordinances.

...

(6) Where an act is at once an offence under the Penal Code and a breach of native law or custom it is the law that a person who commits an act contrary to the provisions of the Penal Code shall be punished under the Code and not otherwise."

Ainley C.J. in his judgment referred to the jurisdiction of the Native Courts under the Ordinance. He said:

"They may try offences which constitute breaches of native law and custom, and they may try other offences only if jurisdiction is conferred upon them by some other Ordinance. But neither the Native Courts Ordinance, nor any other Ordinance confers jurisdiction upon the Native Courts to administer justice under the Penal Code, and I do not think it would be proper for Native Courts to appear to do so."

That judgment was before the Malaysia Act 1963 was passed and before the Federal Constitution was made applicable to Sabah. The judgment became more relevant and pertinent after Sabah entered the Federation.

Proceedings in a Native Court may well be speedy and cheap but too speedy a justice may lead to arbitrariness. We accept the views of Ainley C.J. to be a proper guide for the Native Courts. It cannot be the intention of the Ordinance to allow the Native Courts to assert jurisdiction over an act which constitutes an offence under the Penal Code as the Ordinance gives no definition nor guidance as to the meaning of "breach of native law or custom".

In the instant case, the appellant denied he was responsible for publication of the materials in the *Sabah Times* but admitted lodging the police report. The materials in the newspaper report and the police report were apparently the same and were then the subject of police investigation (not denied by the respondent) and also the subject of investigation by the Anti-Corruption Agency (also not denied by the respondent). Apart from the offence under section 182 of the Penal Code mentioned in the appellant's affidavit as the reason for his arrest, the newspaper report referred to earlier may also attract another offence of criminal defamation under section 499 and section 500 of the Penal Code. Section 2 of the Penal Code reads:

"Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Malaysia."

The intention of section 2 of the Penal Code should be given effect. In our view, it would be improper for the Penampang Native Court to adjudicate on a matter which was the subject of investigation and probable prosecution in the civil courts.

The other issue is the constitutionality of section 7 of the Ordinance with respect to the jurisdiction of the Native Courts on the punishment for offences. Section 7 of the Ordinance reads as follows:

"7. For offences against native law or custom a Native Court may impose a fine or may order imprisonment, or may award both fine and imprisonment, or may inflict any punishment authorized by native law or custom not being repugnant to natural justice and humanity and the fine or other punishment shall in no case be excessive but shall always be proportioned to the nature and circumstances of the offence."

That provision confers on the Native Courts almost unlimited powers of punishment.

In Item 4 of the Federal List in the Ninth Schedule to the Constitution, "civil and criminal procedure and the administration of justice" is prescribed as a federal subject. After Malaysia Day, List IIA was added to the State List in the Ninth Schedule for Sabah and Sarawak. Item 13 under List IIA reads as follows:

"Native law and custom, including the personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession testate or intestate; registration of adoptions under native law or custom; the determination of matters of native law or custom; the constitution, organization, and procedure of Native Courts (including the right of audience in such courts), and the jurisdiction and powers of such courts, which shall extend only to the matters included in this

paragraph and *shall not include jurisdiction in respect of offences except in so far as conferred by federal law.*" (note emphasis)

Section 73(3) of the Malaysia Act 1963 reads as follows:

"Subject to the following provisions of this Part, the present laws of the states of Sabah and Sarawak and of Singapore shall, on and after Malaysia Day, be treated as federal laws in so far as they are laws which could not be passed after Malaysia Day by the state legislature, and otherwise as state laws."

By virtue of section 73(5) of the Malaysia Act, the Ordinance is a "present law" of Sabah. (See also *Re Datuk James Wong Kim Min*[4].) It is a law which after Malaysia Day remains a law on a subject within the powers of the state legislature of Sabah to legislate by virtue of Item 13 of List IIA of the Ninth Schedule to the Constitution. Section 73(3) of the Malaysia Act deals with legislative powers over legislation dealing with what are prescribed by the Constitution as federal subjects. Those legislation became federal laws after Malaysia Day. With effect from Malaysia Day, all state laws of Sabah and Sarawak on federal subjects became federal laws and such laws became "the present law of the Federation", which would lose their validity if they are inconsistent with the Federal Constitution (section 73(4)).

The proper way to look at the problem is to see the similarity between the words used in Item 1 of the State List for Peninsular Malaysia and Item 13 of the State List for Sabah and Sarawak after Malaysia Day.

Item 1 in the State List for Peninsular Malaysia reads:

"1. Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the state; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship; creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, *but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;* the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom." (note emphasis)

In Item 1 of the State List, the words on jurisdiction of the Syariah courts are:

"the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law."

In Item 13 of List IIA of the State List for Sabah and Sarawak, the words on jurisdiction of the Native Courts are:

"the constitution, organization, and procedure of Native Courts (including the right of audience in such courts), and the jurisdiction and powers of such courts, which shall extend only to the matters included in this paragraph and shall not include jurisdiction in respect of offences except in so far as conferred by federal law."

The almost identical language in the limiting provisions referred to cannot escape notice. The intention of the framers of the Constitution and the Malaysia Act is clearly to limit the jurisdiction of those courts in matters of offences. Although "native law and custom" is not defined anywhere in the Constitution, it is quite obvious that the jurisdiction and powers of the Native Courts shall not include jurisdiction in respect of offences except in so far as conferred by federal law.

In Peninsular Malaysia, the jurisdiction of the Syariah Courts is only over persons professing the religion of Islam and the Syariah Courts have only such jurisdiction in respect of offences as conferred by federal law. The federal law concerned is the Muslim Courts (Criminal Jurisdiction) Act 1965. The provision of that federal law conferring jurisdiction reads:

"2. The Muslim Courts duly constituted under any law in a state and invested with jurisdiction over persons professing the Muslim religion and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the Muslim religion by persons professing that religion which may be prescribed under any written law:

Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof."

The 1965 Act originally conferred jurisdiction only in respect of offences punishable with imprisonment for a term not exceeding six months or a fine not exceeding $1,000. The 1965 Act was amended in 1984 where the Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984, effective from 1 January 1985, conferred jurisdiction on the Syariah Courts to deal with cases punishable with imprisonment up to three years or a fine up to $5,000 or whipping up to six strokes or the combination of all these. See also *The Malaysian Legal System* (Ahmad Ibrahim and Ahilemah Joned), pp. 58 and 59.

It is our view that the power to impose a prison sentence under section 7 of the Ordinance as opposed to power to award compensation can only be authorized by a federal legislation to be passed in accordance with Item 13 of List IIA of the State List. The Penampang Native Court therefore acted without or in excess of jurisdiction when it imposed the sentence of imprisonment on the appellant.

Appeal allowed.

Solicitors: *Sugumar & Co.*

PUBLIC PROSECUTOR v. KAU JOO HUAT

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C.JJ.) 10 October 1987 & 13 February 1988]

[Kuala Lumpur – Supreme Court Criminal Reference No. 7 of 1987]

Criminal Law – Dangerous drugs – Possession of – Whether necessary to prove power of disposal of drug by the accused – Failure to prove accused had custody and control of the drug found in bag – Dangerous Drugs Act 1952, s. 37(d).

In this case a police party, acting on information, raided a room in a hotel and found the respondent and two travelling bags – one green and the other red. They searched the bags. Nothing incriminating was found in the green bag. However, in the red bag they found two pairs of trousers, one of which was black in colour and a black box. Inside the black box was a plastic packet which contained a substance which on analysis by the government chemist was found to be opium. Later in a follow-up operation, a man called Hassan was arrested when he came knocking at the door of the room. The respondent's story was that he shared the room with Hassan and that the red bag belonged to Hassan. The learned President of the Sessions Court found that the black pair of trousers was the type normally worn by exponents of the Malay art of self-defence. The investigating officer also said in evidence that the pair of black trousers was like bersilat trousers.

Nevertheless, the learned President found that the presumption under section 37(d) of the Dangerous Drugs Act 1952 had not been rebutted. On appeal, the learned judge of the High Court, in allowing the appeal, held that the presumption had been rebutted and that the prosecution must prove that the accused had the power of disposal of the drug. The Public Prosecutor then applied for the following question of law to be referred to the Supreme Court: "Whether possession for the purpose of the Dangerous Drugs Act 1952 would require proof of the power of disposal of the drug by the accused?"

Held: (1) the answer to the question is in the negative. The learned judge was wrong to say that the accused must have the power of disposal to support the conviction;

(2) on the facts of this case, it is a matter of grave doubt whether on the totality of the evidence the prosecution has established that the accused had custody and control of the drug found in the bag. The benefit of the doubt should have been decided in favour of the accused;

(3) the learned President of the Sessions Court did not give sufficient consideration, or gave no consideration of all, to the factors raised by the defence but merely brushed aside the defence of non-knowledge. The failure on the part of the learned President had occasioned injustice and the learned judge was right to quash the conviction and sentence.

Cases referred to:

(1) *Toh Ah Loh and Mak Thim* v. *Rex* [1949] M.L.J. 54 (refd).
(2) *Chan Pean Leon* v. *Public Prosecutor* [1956] M.L.J. 237 (refd).
(3) *Public Prosecutor* v. *Ang Boon Foo* [1981] 1 M.L.J. 40 (refd).
(4) *Leow Nghee Lim* v. *R.* [1956] M.L.J. 28 (refd).
(5) *R.* v. *Smith* (1855) 6 Cox 554 (refd).

SUPREME COURT.

Mohd Noor bin Haji Ahmad (Deputy Public Prosecutor) for the applicant.

Phang Ah Hee for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the court): This reference under section 66(1) of the Courts of Judicature Act 1964 reserves the following question for the decision of this court:

"Whether possession for the purpose of the Dangerous Drugs Act 1952 would require proof of the power of disposal of the drug by the accused?"

It is necessary to set out the facts. On 2 August 1981, acting on information, a police party led by a police inspector raided a room in Sentosa Hotel. They found the respondent and two travelling